

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RUCHELL CINQUE MAGEE,

1:05-cv-00348-AWI-LJO-P

Plaintiff,

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS** (Doc. 12)

vs.

M.E. SCOTT, et al.,

**ORDER DISMISSING ACTION, WITH
PREJUDICE**

Defendants.

Plaintiff Ruchell Cinque Magee ("plaintiff"), a state prisoner proceeding pro se and in forma pauperis, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) (1) (B) and Local Rule 72-302.

On December 21, 2005, the Magistrate Judge filed a Findings and Recommendations herein which was served on plaintiff and which contained notice to plaintiff that any objections to the Findings and Recommendations were to be filed within twenty (20) days. To date, plaintiff has not filed objections to the Magistrate Judge's Findings and Recommendations.

1 In accordance with the provisions of 28 U.S.C. §
2 636(b) (1) (C) and Local Rule 73-305, this Court has conducted a de
3 novo review of this case. Having carefully reviewed the entire
4 file, the Court finds the Findings and Recommendations to be
5 supported by the record and by proper analysis.

6 The court notes that Plaintiff has filed an appeal in this
7 action. In general, the filing a notice of appeal transfers
8 jurisdiction over the matters appealed to the court of appeals,
9 and the district court generally is divested of jurisdiction over
10 those aspects of the case involved in the appeal. Griggs v.
11 Provident Consumer Discount Co., 459 U.S. 56, 58 (1982) (per
12 curiam); Mayweathers v. Newland, 258 F.3d 930, 935 (9th Cir.
13 2001). However, a notice of appeal from a nonappealable order
14 will not divest the district court of jurisdiction. Estate of
15 Connors by Meredith v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993);
16 United States v. Garner, 663 F.2d 834, 838 (9th Cir.1981); Ruby
17 v. Secretary of the Navy, 365 F.2d 385, 389 (9th Cir.1966) (en
18 banc). Here, Plaintiff is attempting to appeal the Magistrate
19 Judge's order dismissing this action with leave to amend. Where
20 a notice of appeal fails to transfer jurisdiction to the
21 appellate court, jurisdiction remains in the district court
22 because jurisdiction "cannot float in the air." Estate of
23 Connors by Meredith v. O'Connor, 6 F.3d 656, 659 (9th Cir. 1995);
24 Ruby, 365 F.2d at 388. Plaintiff has failed to file an amended
25 complaint, and Plaintiff's attempts to appeal earlier orders of
26 this court do not deprive the court of jurisdiction.

27 Accordingly, IT IS HEREBY ORDERED that:

28 1. The Findings and Recommendations, filed December 21,

1 2005, is ADOPTED IN FULL; and,

2 2. This action is DISMISSED, with prejudice, for
3 plaintiff's failure to obey the court's order, and for failure to
4 state a claim upon which relief may be granted.

5
6 IT IS SO ORDERED.

7 **Dated: March 3, 2006**
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/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE